Supreme Court, U.S.
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No. 120 (1)

In the Supreme Court of the United States

Mark Krueger,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where State law requires that a person's conduct must be significantly and substantially more serious than that which is typically involved in the commission of the crime in question before the Court may impose a sentence which is an upward departure from the presumptive sentence, is a Defendant entitled to have this question decided by a Jury, following Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) and Cunningham v. California, 549 U.S. 270 (2007)?

2. When a person pleads guilty to three Counts of a Complaint, and as to the second count, there are no aggravating factors and no substantial or compelling circumstances that show the person's conduct was more serious than that which is typically involved in the commission of the crime in question, and no statutory authority, may the Court impose a consecutive sentence, which is an upward departure from the presumptive concurrent sentence?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Krueger respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Minnesota Court of Appeals filed its Opinion in this case on November 10, 2008. Appendix Page A-1. The Opinion is unpublished, but may be found at 2008 WL 4849629 (Minn.App. 2008)

The Minnesota Supreme Court denied Review by Order dated January 20, 2009. Appendix Page A-12.

BASIS FOR JURISDICTION

The Minnesota Supreme Court denied Review by Order dated January 20, 2009.

28 U.S.C. § 1257(a) confers jurisdiction on the United States Supreme Court to review decisions by the highest state court when United states constitutional issues are involved. In this case, the right to trial by jury.

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have

been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XVI, § 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statutes under which Petitioner was convicted, and the relevant sentencing guidelines and statutory definitions are set forth in the Appendix hereto.

STATEMENT OF THE CASE

In 2003, Petitioner was convicted by his plea of guilty to three Counts of a criminal complaint, and was sentenced to 336 months, (28 years) which is more than double the presumptive sentence of 144 months (12 years).

Petitioner had allowed his then girlfriend and

her two children, a girl age 13 and a boy age 11, to temporarily move into his home. Petitioner admitted to engaging in oral sex with the 13 year old daughter when his girlfriend took her son to go and work on a trailer home where she was intending to move. The girl chose to stay with Petitioner. They started with picture taking. The pictures became more and more improper, and things progressed until they engaged in oral sex.

Petitioner entered a guilty plea to Count I, Criminal Sexual Conduct In The First Degree, 609.342 Subdivision 1(g), specifically, engaging in oral sexual conduct with a female who was 13 years of age; Count II, Use Of A Minor In A Sexual Performance, 617.246 Sub. 2, which involved videotaping the above sexual acts; and Count III, Possession Of Child Pornography, 617.247 Sub. 4(a), being possession of the above video tape and the photographs. Neither the video or the photographs were ever sold or made public. Subdivision 1(g) involves cases where the actor has a significant relationship with the complainant, i.e., a family situation.

On October 24, 2003, the District Court sentenced Petitioner to 288 months, or 24 years, which is double the presumptive sentence for Count I, and 48 months for Count II, and ordered that the 4 year sentence for Count II be served consecutively, following Count I. This was also an upward durational departure, because the presumptive sentence is a concurrent sentence. Petitioner received a concurrent sentence for Count III.

In doubling the presumptive sentence for Count I, the District Court recited seven so called "aggravating factors" which the court came up with on its own.

All of the above "aggravating factors" were either untrue, or improper, and none of these "factors" were any longer being considered in this case following the second appeal and remand.

Appellant appealed the double upward departure and the imposition of the consecutive sentence. The Court of Appeals remanded the issue of the increased sentence as to Count I because Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) had been decided while Petitioner's case was pending. State v. Krueger, No. A04-122, 2004 WL 1878998. The Court of Appeals affirmed the consecutive sentence as to Count II.

Because the case was remanded, and not final, Petitioner could not seek review by the Minnesota Supreme Court at that time.

On remand, the District Court imposed the same sentence, stating that all of the aggravating factors it found were admitted by Petitioner.

Petitioner again appealed, and the Court of Appeals again reversed, holding that there were no effective admissions by Petitioner, and upon Petitioner's request, set forth a number of factors that could not be used as aggravating factors, or as a basis for an increased sentence. State v. Krueger, No. A05-363, Order Opinion, Filed August 3, 2005.

The District Court then granted the State's Motion to impanel a sentencing jury. Petitioner then demanded that the State advise Petitioner of what aggravating factors it intended to prove. (Up to that time, it had been the District Court coming up with the "aggravating factors" on its own.)

On January 19, 2006, the State, for the first time, served a Notice stating that it sought to submit four aggravating factors to a jury:

1. The victim suffered multiple acts of sexual

abuse by the defendant.

2. The victim suffered multiple forms of penetration and sexual contact.

3. The victim was posed in graphic sexual positions and photographed by the defendant repeatedly.

4. The defendant secretly videotaped the victim while he sexually abused her.

Petitioner filed a Motion in opposition to the State's request. By Order dated March 13, 2006, the District Court denied items 1, 3, and 4, of the aggravating factors that the State requested. This left the claim of multiple forms of penetration as the only alleged aggravating factor that the State would be allowed to attempt to prove.

Petitioner then brought a Motion to have his sentence for count II modified to run concurrent with Count I, because following the Court's Order dated March 13, 2006, there were no aggravating factors upon which to base an upward departure of a consecutive sentence for Count II, and that Petitioner's sentence for Count I be modified to the presumptive sentence of 144 months, because multiple forms of penetration can not be used as an aggravating factor for violation of 609.342, Subdivision 1(g). At the hearing on May 26, 2006, the Court orally denied Petitioner's Motion.

Petitioner appealed the May 26, 2006 Order, however on motion of the State, the Court of Appeals dismissed the appeal, stating that because a sentencing jury had not been impaneled and a final sentencing decision reached, the appeal was premature. State v. Krueger, Appellate Court File No. A06-1603.

Petitioner then submitted a Memorandum Regarding Jury Instructions, and a proposed verdict

form to the District Court, pointing out that under Minnesota law, before there can be an upward departure, there must be substantial and compelling circumstances or factors that go beyond the conduct typically found in similar types of cases, and that, based on Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) and Cunningham v. California, 549 U.S. 270 (2007), whether or not there was conduct substantially and compellingly more severe than the acts normally done in similar cases is a fact that must be found by a jury. Appendix Page A-30, A-34.

The District Court refused Petitioner's requested jury questions, and submitted a Special Verdict Form containing one question. Appendix Page A-36.

The jury viewed the video and found that there was more than one form of penetration. Not more than two, just more than one.

Appellant filed an additional Request For Sentence Modification, again pointing out the single course of conduct, that all of Defendant's actions were contained within the definition in 609.341, Subd. 12, that multiple forms of penetration can not be used as an aggravating factor for violations of 609.342, Subdivision 1(g) or (h), that the requirements of Blakely v. Washington and Cunningham v. California had not been satisfied, and that the lack of any aggravating factor as to Count II, required that the presumptive concurrent sentence be imposed.

On July 19, 2007, the Trial Court again imposed the original sentence of a double upward departure for Count I, and a consecutive sentence as to Count II.

The District Court never made any finding that Appellant's conduct in this case was substantially and compellingly more serious than the

acts typically found in similar cases.

Petitioner appealed to the Minnesota Court of Appeals.

At Page 5 of the opinion, Appendix Page A-5, the Court of Appeals acknowledged that

"Generally, in determining whether to depart durationally, the district court must determine whether the defendant's conduct was "significantly more serious than typically involved in the commission of the offence." State v. Best, 449 N.W.2d 426, 427 (Minn. 1989)."

Despite Petitioner's strong contentions in the Court of Appeals, both in briefing and at oral argument, that under Blakely and Cunningham, that precise question now had to be decided by a jury, the Court of Appeals made absolutely no attempt to justify its refusal to so.

At Page 7 of the opinion, Appendix Page A-8, the Court of Appeals stated that Petitioner provided no legal support for his position, apparently ignoring the numerous cites to Blakely and Cunningham. The Court of Appeals cited State v. Rodriguez, 754 N.W.2d 672 (Minn. 2008) and State v. Chauvin, 723 N.W.2d 20 (Minn. 2006) as authority that a jury does not have to decide if a defendant's conduct was significantly more serious than that typically done in the commission of similar offenses, however neither Rodriguez or Chauvin dealt with that issue at all.

It is undisputed that as to Count II, the record shows that there are no aggravating factors found or submitted. At oral argument in the Court of Appeals, the State admitted that an aggravating factor was needed on Count II before a consecutive sentence could be imposed.

In 2003, Minnesota Sentencing Guidelines provided that "consecutive sentences are permissive

(may be given without departure) only in the following cases:" ... "2. Multiple current felony convictions for crimes against persons may be sentenced consecutively to each other;". Count II is not contained in the statutory definitions of "crimes against persons", which generally are violent crimes. Appendix Pages A-24, A-27 and A-28

Since Petitioner's constitutional rights require that any factors needed to impose more than the presumptive sentence must be found by a jury, it would certainly follow that where there are no aggravating factors, the presumptive sentence must be applied.

Petitioner filed a Petition For Review with the Minnesota Supreme Court, Appendix Page A-52, however by Order dated January 20, 2009, the Minnesota Supreme Court denied Petitioner's Petition For Review.

REASONS THE WRIT SHOULD BE ALLOWED.

I. PETITIONER ENTITLED TO JURY.

All levels of the Court system in Minnesota, including the Minnesota Supreme Court, which is the Court of last resort in Minnesota, have decided a Federal question in a way that conflicts with the relevant decisions of the United States Supreme Court.

In this case, the Minnesota Courts have refused to allow a jury to decide whether Petitioner's conduct in the commission of the crime in question was substantially more serious than the conduct typically found in the commission of the same crime by others.

In Minnesota the basic law is that before a

Court may impose an upward departure from the presumptive sentence, it must be determined that the Defendant's conduct was substantially more serious than the conduct typically found in the commission of the crime in question.

This basic rule of law was acknowledged by both the attorney for the State, and the Court of Appeals in its opinion. It is Petitioner's position, as argued before all levels of the Minnesota Courts, that following Blakely and Cunningham this question must now be decided by a jury.

In its opinion, the Court of Appeals cites various reasons why Petitioner was not entitled to have a jury decide this issue, however, none of those reasons are valid.

Basically, what the Court of Appeals said is that we have always done it this way.

One of the arguments made by the Court of Appeals is that once a jury decides that an "aggravating factor" exists, Judges then makes the judicial determination of whether that makes the Defendant's conduct more serious than what is typically done in a similar case.

It has always been Petitioner's position that that is exactly what the United States Supreme Court, in Blakely and Cunningham, said could not be done.

Another argument made by the Court of Appeals, after acknowledging that "Generally, in determining whether to depart durationally, the district court must determine whether the defendant's conduct was "significantly more serious than typically involved in the commission of the offense", was that "the role of a reviewing Court is to determine whether the reasons given by the district court in support of its departure are justified under

the law. Citing the 1985 case of Williams v. State, 361 N.W2d 840 (Minn. 1985) Opinion at page 5, Appendix Page A-5.

Obviously the 1985 case of Williams v. State, was long before the decisions in Blakely and Cunningham.

It is respectfully submitted that under Blakely and Cunningham, it does not make any difference whether the facts are found by the sentencing Court or the State Appellate Courts. The impropriety is still the same. The finding or determination was made by a Judge, and not a jury.

At page 7 of the opinion, Appendix Page A-7, 8, the Court of Appeals bootstraps itself by saying "The conclusion that sexual abuse is significantly worse when a defendant subjects his victim to multiple forms of sexual penetration is supported by the fact that Minnesota appellate courts have upheld double- and triple durational departures based on multiple forms of sexual penetration, albeit in addition to other aggravating factors".

The point is that it does not matter that the Courts upheld this practice prior to Blakely and Cunningham. The United States Supreme Court has now established that juries must make that determination.

Also, the Court of Appeals relies on the premise that once a jury finds an "aggravating factor" that is all that is needed.

That could be true if the aggravating factor was prescribed by the legislature as a basis for an upward departure.

But that is not the case here. In this case, the jury was asked, and found that Petitioner engaged in more than one form of penetration and sexual contact.

More than one form of penetration has not been prescribed by the legislative as an aggravating factor, and it is not in the list of aggravating factors provided by the sentencing guidelines commission. That list is in the Appendix at page A-20.

So what the Courts are doing is taking an act, calling it an aggravating factor, and then asking a jury to find that it existed or happened. Then with nothing more, impose an upward departure in sentencing.

Over the years, Courts have come up with numerous things on their own that they have called "aggravating factors" as a basis for an upward departure. Sometimes it worked, and sometimes an Appellate Court would reverse, holding that what the Sentencing Court found, did not make the Defendant's conduct substantially more serious than that typically found in the commission of the crime. State v. Hutton, 2003 WL 22889448; State v. Best, 449 N.W.2d 426, 427, (Minn. 1989); State v. Cook, 351 N.W.2d 355 (Minn.App. 1984).

Thus, unless it is prescribed by the legislature, the ultimate question is whether or not a Defendant's conduct was substantially more serious than that typically involved in the commission of the crime in question.

This case is a good example of why this is important. In this case, the jury found that Petitioner engaged in more than one form of penetration, not more than two, just more than one.

In viewing the video, it was obvious that Petitioner engaged in oral and digital penetration. The video shows that this happened in one course of conduct.

It is hard to imagine that digital penetration is not present along with penal or oral penetration in

almost every case.

However, whether or not Petitioner's conduct in this case was substantially more serious than that typically found in the commission of this crime, is a fact question, which under Blakely and Cunningham, Petitioner has the constitutional right to have decided by a jury.

II. CONSECUTIVE SENTENCE FOR COUNT II.

As to the consecutive sentence on Count II, Blakely and Cunningham provide that a Defendant must be given a presumptive sentence unless a jury finds facts which justify an upward departure.

In this case there are no aggravating factors claimed, and none have been found by any jury.

The State and the Court of Appeals argue that Petitioner's sentence was final after it was affirmed in the first appeal, but that is not true.

Because the case was remanded for determination of Blakely issues, it was not final, and Petitioner could not seek review by the Minnesota Supreme Court. In addition, Blakely applies to the issue of consecutive sentence when the presumptive sentence is a concurrent sentence, just as it applied to the aggravating factors of Count I.

After remand, and the motion by the State, the opposition by Petitioner, and the March 13, 2006 ruling by the District Court, it was clear that there were no aggravating factors as to Count II in this case.

If the presumptive sentence is a concurrent sentence, Petitioner's constitutional rights were violated if the Court imposed an upward departure of a consecutive sentence without the benefit of a jury finding.

The only exception would be if the legislative had made a provision allowing it, however, contrary to what the Court of Appeals said, that is not the case. That issue has not been addressed by the legislature.

The only place it is addressed is in the Sentencing Guidelines. Under Permissive Consecutive Sentences in Section II.F of the Sentencing Guidelines, Appendix Page A-24, it states:

> consecutive sentences are permissive (may be given without departure) only in the following cases:
>
> * * *
>
> 2. Multiple current felony convictions for crimes against persons may be sentenced consecutively to each other;

Emphasis added.

Use Of A Minor In A Sexual Performance, 617.246 Sub. 2, for which Petitioner was convicted under Count II, is not contained in the statutory definitions of "crimes against persons".

Crimes against persons are defined by Statue, and involve violent crimes such as murder and assault. Minn. Stat. 243.167, 253B.02, Subd. 4a. Appendix Page A-27, A-28.

Because Count II is not defined as a "crime against a person", a consecutive sentence is not permitted.

Also, at oral argument in the Court of Appeals, counsel for the State acknowledged that an aggravating factor was needed relating to Count II before a consecutive sentence could be imposed.

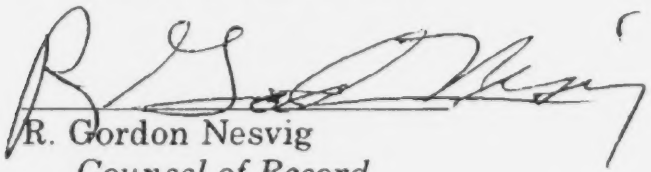
CONCLUSION

In this case, it is quite likely that because the Minnesota courts denied Petitioner his constitutional rights to a jury trial, Petitioner is under a sentence, which is 16 years longer than the presumptive sentence of 12 years.

A check via Westlaw shows that a number of other states also have the same basic rule that requires a person's conduct to be substantially more serious than that done in the typical commission of the crime in question before a court may impose an upward departure from the presumptive sentence. It is only a matter of time before this issue arises in those states, if it has not done so already.

Based on the foregoing, Petitioner respectfully preys that the writ of certiorari be granted.

Respectfully submitted,



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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A. 08, subd. 3 (2006).

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1993

State of Minnesota,
Respondent,

vs.

Mark Krueger,
Appellant.

Filed November 10, 2008
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. K4-03-1313

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Susan E. Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

R. Gordon Nesvig, Box 255, Cottage Grove, MN 55016 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his 288-month executed sentence for first-degree criminal sexual conduct and the district court's imposition of a consecutive sentence for use of a minor in a sexual performance. Because the district court properly based its upward sentencing departure on a jury finding that appellant engaged in multiple forms of sexual penetration and because the consecutive sentencing was permissive, we affirm.

FACTS

This case is before us after remand to the district court for resentencing under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Krueger*, No. A04122, 2004 WL 1878998 (Minn. App. Aug. 24, 2004). In 2003, appellant pleaded guilty to three offenses pertaining to his sexual relationship with a 13-year-old female: count one, first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2002); count two, use of a minor in a sexual performance in violation of Minn. Stat. § 617.246, subd. 2 (2002)[1]; and count

---

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

[1] Appellant videotaped his sexual conduct with his 13-year-old victim.

three, possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2002). On count one, the district court sentenced appellant to 288-months' imprisonment, a double-durational upward departure. On count two, the district court assigned a severity level of 8 and imposed a 48-month sentence consecutive to appellant's sentence on count one. On count three, the district court sentenced appellant to one year and one day concurrent with his sentences on counts one and two.

The district court found that several aggravating factors justified appellant's upward-durational departure and consecutive sentences: (1) the victim was vulnerable because she was 13 years old and of reduced physical capacity; (2) the victim's zone of privacy was invaded because she was abused in her own home; (3) the abuse occurred over an extended period of time with multiple penetrations; (4) appellant videotaped his abuse of the victim without the victim's knowledge; and (5) appellant showed no remorse and failed to take responsibility for his actions.

In his first appeal, appellant argued that the district court abused its discretion in sentencing him to a double-durational upward departure on count one and a consecutive sentence on count two, arguing as to his consecutive sentence that the conduct underlying his conviction on count two stemmed from the same course of conduct as count one. *Krueger*, 2004 WL 1878998, at *4, *6. While the first appeal was pending, the United States Supreme Court issued its decision in *Blakely*, holding that facts used to enhance a sentence beyond the statutory maximum must be found by a jury or admitted by the defendant. We considered appellant's argument that

a double-durational upward departure on count one was inappropriate and remanded appellant's sentence to the district court for "a consideration of the application, if any, of *Blakely* to appellant's sentence." *Krueger,* 2004 WL 1878998, at *4. On remand, the district court reaffirmed its decision to depart because the facts on which it relied were admitted by the defendant. Appellant again challenged his sentences, and we again remanded appellant's sentence because appellant's factual admissions were not accompanied by a waiver of his right to a jury trial on those facts. *State v. Krueger,* No. A05-363 (Minn. App. Aug. 2, 2005) (order op.).

On the second remand, the district court empanelled a sentencing jury to determine whether aggravating factors existed to support an upward departure. The sole aggravating factor submitted to the jury was appellant's alleged use of multiple forms of sexual penetration. The jury heard testimony and viewed a videotape made by appellant of his sexual conduct with the victim. Appellant's counsel argued to the district court that the consecutive sentence on count two constituted a sentencing departure, and that because the jury was not asked to find aggravating factors pertaining to count two, that sentence must be concurrent. The district court stated its belief that the consecutive sentence was permissive. Appellant's counsel also argued that this court had remanded all of appellant's sentences to the district court, and the district court rejected this argument, indicating that it was the court's intention to deal only with the sentence on count one. The sentencing jury found that appellant had subjected the victim to multiple forms of penetration. The district court again imposed a 288-month sentence on

count one and refused to modify the consecutive sentence on count two. Appellant again challenges his sentences.

DECISION

The decision to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Givens,* 544 N.W.2d 774, 776 (Minn. 1996). A district court may not deviate from a presumptive sentence without specifying "the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D. Generally, in determining whether to depart durationally, the district court must determine whether the defendant's conduct was "significantly more serious than typically involved in the commission of the offense." *State v. Best,* 449 N.W.2d 426, 427 (Minn. 1989). The role of a reviewing court is to determine whether the reasons given by the district court in support of its departure are justified under the law. *Williams v. State,* 361 N.W.2d 840, 844 (Minn. 1985).

Multiple Forms of Penetration

Appellant argues that because multiple forms of penetration are part of the charged offense, Minn. Stat. § 609.342, subd. 1(g) (2002), this cannot be used to enhance a sentence for a conviction of that offense. "The reasons used for departing must not themselves be elements of the underlying crime." *State v. Blanche,* 696 N.W.2d 351, 378-79 (Minn. 2005). A reviewing court interprets a criminal statute "[biased

on the plain language of the statute and our previous decisions interpreting the statute." *State v. Reese,* 692 N.W.2d 736, 743 (Minn. 2005).

Minnesota Statutes, section 609.342, subdivision 1(g), provides that:

> A person who engages in sexual penetration with another person . . . is guilty of criminal sexual conduct in the first degree if . . . the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration.

The plain language of this statute includes the term "sexual penetration" in its singular form, implying that only one act of sexual penetration is needed to violate the statute. Moreover, this court has held that multiple forms of sexual penetration is a permissible aggravating factor to support an enhanced sentence where the defendant was convicted under Minn. Stat. § 609.342, subd. 1(g). *State v. Adell, 755* N.W.2d 767, 774 (Minn. App. 2008), *pet. for review filed* (Minn. Oct. 14, 2008). Additionally, in *Adell,* we held that multiple forms of penetration is not an essential element of Minn. Stat. § 609.342, subd. 1(h)(iii), which is identical to subd. 1(g) except that it includes the additional requirement of multiple acts of sexual abuse over an extended period of time. *Id.* We therefore reject appellant's argument that multiple forms of penetration is included in a charged offense under Minn. Stat. § 609.342, subd. 1(g).

Citing numerous cases, appellant acknowledges that Minnesota appellate courts have

held that multiple forms of penetration is a proper aggravating factor for the district court's consideration in imposing an upward departure for first-degree criminal sexual conduct, but appellant argues that these cases involved conduct more egregious than his conduct in this case. *See, e.g., Ture v. State*, 353 N.W.2d 518, 522 (Minn. 1984) (imposing a double-upward durational departure on a defendant who violently raped his victim); *State v. Morales-Mulato*, 744 N.W.2d 679, 692 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008) (affirming an upward durational departure where the defendant brandished a pocket knife and threatened to harm the victim and her family); *State v. Butterfield*, 555 N.W.2d 526, 531-32 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996) (affirming a triple-durational upward departure where the defendant kidnapped and sexually assaulted his victim at knifepoint). Appellant argues that his conduct was less egregious for a number of reasons: the victim was not related to him; the victim was 13 years old; appellant did not use force or threats to coerce the victim into a sexual relationship; and there was no physical injury or pregnancy. We reject appellant's argument that his conduct was not significantly more serious than typically involved in the commission of an offense under Minn. Stat. § 609.342, subd. 1(g), merely because cases exist that arguably involved more serious conduct than appellant's conduct in this case.

The conclusion that sexual abuse is significantly worse when a defendant subjects his victim to multiple forms of sexual penetration is supported by the fact that Minnesota appellate courts have upheld double- and triple-durational departures based on multiple forms of sexual penetration, albeit

in addition to other aggravating factors. *See State v. Dietz,* 344 N.W.2d 387, 389-90 (Minn. 1984) (affirming a greater-than-double-durational departure in a case lacking egregious factors like injury, pregnancy, and threatening behavior or physical force); *State v. Mesich,* 396 N.W.2d 46, 52 (Minn. App. 1986), *review denied* (Minn. Jan. 2, 1987) ("Multiple penetrations alone will generally justify a double, but not greater, upward durational departure."). We cannot conclude that the district court abused its discretion in imposing an upward double-durational departure based on a finding of multiple forms of penetration. *See Best,* 449 N.W.2d at 427 (stating that a district court has "broad discretion to depart" if aggravating factors exist).

Appellant also argues that a jury, not a district court judge, must make the factual finding that a defendant's conduct is "significantly more serious than typically involved in the commission of the charged offense in order to support a departure. *Id.* Appellant provides no legal support for this argument, apparently disregarding the fact that in many cases decided since *Blakely,* the Minnesota Supreme Court has affirmed upward departures where a jury has found the existence of aggravating factors without determining that the conduct underlying the offense was significantly more serious than typically involved in its commission. *See, e.g., State v. Rodriguez,* 754 N.W.2d 672 (Minn. 2008); *State v. Chauvin,* 723 N.W.2d 20 (Minn. 2006). We reject appellant's argument.

Consecutive Sentencing

Appellant also argues that the acts he

committed were part of one course of conduct and, therefore, consecutive sentencing is precluded. *See* Minn. Stat. § 609.035, subd. 1 (2002) ("[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . . ."). But this court has already concluded that the conduct underlying the three offenses was "clearly motivated by different criminal objectives," *Krueger,* 2004 WL 1878998, at *6, and we will not reconsider this issue on appeal. *See State v. Al-Naseer,* 734 N.W.2d 679, 683 (Minn. 2007) (stating that where an appellate court decides a legal issue in a case and remands for further proceedings, its decision becomes the "law of the case" and may not be reconsidered in the district court or on another appeal).

Appellant also argues that the district court erred in imposing a consecutive sentence on count two, because no aggravating factor supports an upward departure on that count. "Generally, when an offender is convicted of multiple current offenses .. . concurrent sentencing is presumptive." Minn. Sent. Guidelines II.F (2002). Unless consecutive sentencing is presumptive or permissive, consecutive sentencing "constitutes a departure from the guidelines," and the district court must provide written reasons justifying the departure. *Id* But the guidelines provide that:

> It is permissive for multiple current felony convictions against persons to be sentenced consecutively to each other when the presumptive disposition for these offenses is commitment to the Commissioner of Corrections as determined under the

> procedures outlined in Section II.C. Presumptive Sentence. Consecutive sentencing is permissive under these circumstances even when the offenses involve a single victim involving a single course of conduct.

Minn. Sent. Guidelines cmt. II.F.04 (2002). In this case, the presumptive guidelines sentence on appellant's conviction on count one is commitment to the commissioner of corrections. Minn. Sent. Guidelines IV (2002). Likewise, the presumptive sentence on appellant's conviction on count two is also commitment to the commissioner of corrections, based upon the district court's assignment of a severity level of 8.[2] Because the presumptive sentences for both counts one and two are commitment to the commissioner of corrections, *id.*,

---

[2] On count two, appellant was convicted under Minn. Stat. § 617.246, subd. 2. The Offense Severity Reference Table in the guidelines excludes this offense, and therefore it has no assigned severity level in the guidelines. Minn. Sent. Guidelines cmt. II.A.03 (2002). But the district court assigned the offense a severity level of 8, because it determined that such a ranking is "consistent with the ranking for similar behavior in this jurisdiction and reflects behavior between criminal sexual conduct in the second degree and criminal sexual conduct in the first degree." Because the presumptive sentence for an offense with a severity level of 8 is commitment to the commissioner of corrections, Minn. Sent. Guidelines IV, consecutive sentencing by the district court was permissive in this case.

consecutive sentencing is permissive in this case.

In *State v. Senske,* 692 N.W.2d 743, 748-49 (Minn. App. 2005), *review denied* (Minn. May 17, 2005), we held that "*Blakely* does not apply to permissive consecutive sentencing based on a finding that the offenses are 'crimes against persons' and that "*Blakely* does not require the jury to determine the relationship between multiple sentences any more than it would require a jury determination whether multiple sentences are permissible." Since consecutive sentencing is permissive in this case, *Blakely* does not apply. Therefore, because we remanded this case to the district court for "a consideration of the application, if any, of *Blakely* to appellant's sentence," *Krueger,* 2004 WL 1878998, at *5, the district court correctly concluded that the propriety of appellant's consecutive sentence on count two was not before it. *See State v. Roman Nose,* 667 N.W.2d 386, 394 (Minn. 2003) ("On remand, it is the duty of the district court to execute the mandate of this court strictly according to its terms"). The district court did not err in refusing to consider appellant's consecutive sentence on count two on remand.

Affirmed.

Heidi A. Schellhas
November 4, 2008

STATE OF MINNESOTA
IN SUPREME COURT

A07-1993

State of Minnesota,
Respondent,

vs.

Mark Krueger,
Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Mark Krueger for further review be, and the same is, denied.

Dated: January 20, 2009

BY THE COURT:

s/_____
Eric J. Magnuson
Chief Justice

STATE OF MINNESOTA **JUDGMENT**

State of Minnesota, Respondent,

vs.

Mark Krueger, Appellant

Court of Appeals
Appellate Court # A07-1993
Trial Court # K4-03-1313

Pursuant to a decision of Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Ramsey County District Court, Criminal Division herein appealed from be and the same hereby is affirmed and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: February 6, 2009

FOR THE COURT

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: s/_____
Assistant Clerk

STATE OF MINNESOTA COURT OF APPEALS

TRANSCRIPT OF JUDGMENT

I, Frederick K Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center, In the City of St. Paul

February 6, 2009
Dated

Frederick K Grittner
Clerk of the Appellate Courts

By: s/
Assistant Clerk

Subd. 12. "Sexual penetration" means any of the following acts committed without the complainant's consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:

(1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or

(2) any intrusion however slight into the genital or anal openings:

(i) of the complainant's body by any part of the actor's body or any object used by the actor for this purpose;

(ii) of the complainant's body by any part of the body of the complainant, by any part of the body of another person, or by any object used by the complainant or another person for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired; or

(iii) of the body of the actor or another person by any part of the body of the complainant or by any object used by the complainant for this purpose, when effected by a person in a position of authority, or by coercion, or by inducement if the child is under 13 years of age or mentally impaired.

609.342. Criminal sexual conduct in the first degree

Subdivision 1. Crime defined. A person who engages in sexual penetration with another person, or in sexual contact with a person under 13 years of age as defined in section 609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(a) the complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(b) the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense;

(c) circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another;

(d) the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(e) the actor causes personal injury to the complainant, and either of the following circumstances exist:

(i) the actor uses force or coercion to accomplish sexual penetration; or

(ii) the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless;

(f) the actor is aided or abetted by one or more accomplices within the meaning of section 609.05, and either of the following circumstances exists:

(i) an accomplice uses force or coercion to cause the complainant to submit; or

(ii) an accomplice is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit;

(g) the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(h) the actor has a significant relationship to the complainant, the complainant was under 16 years of age at the time of the sexual penetration, and:

(i) the actor or an accomplice used force or coercion to accomplish the penetration;

(ii) the complainant suffered personal injury; or

(iii) the sexual abuse involved multiple acts committed over an extended period of time.

Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense.

Subd. 2. Penalty. (a) Except as otherwise provided in section 609.109, a person convicted under subdivision 1 may be sentenced to imprisonment for

not more than 30 years or to a payment of a fine of not more than $40,000, or both.

(b) Unless a longer mandatory minimum sentence is otherwise required by law or the sentencing guidelines provide for a longer presumptive executed sentence, the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of violating this section. Sentencing a person in a manner other than that described in this paragraph is a departure from the sentencing guidelines.

Subd. 3. Stay. Except when imprisonment is required under section 609.109, if a person is convicted under subdivision 1, clause (g), the court may stay imposition or execution of the sentence if it finds that:

(a) a stay is in the best interest of the complainant or the family unit; and

(b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.

If the court stays imposition or execution of sentence, it shall include the following as conditions of probation:

(1) incarceration in a local jail or workhouse;

(2) a requirement that the offender complete a treatment program; and

(3) a requirement that the offender have no unsupervised contact with the complainant until the offender has successfully completed the treatment program unless approved by the treatment program and the supervising correctional agent.

2. *Factors that* may *be used as- reasons for departure:* The following is a nonexclusive list of factors which may be used as reasons for departure:

a. Mitigating Factors

(1) The victim was an aggressor in the incident.

(2)The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress:

(3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

(4) The offender's presumptive sentence is a commitment to the commissioner but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at severity level I or II and the offender received all of his or her prior felony sentences during less than three separate court appearances; or

(b) The current conviction offense is at severity level III or IV and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

(6) Alternative placement for offender with serious and persistent mental illness (See Minn. Stat. § 609.1055).

b. Aggravating Factors:

(1) The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.

(2) The victim was treated with particular cruelty for which the individual offender should be held responsible.

(3) The current conviction is for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a Criminal Sexual Conduct offense or an offense in which the victim was otherwise injured.

(4) The offense *was a* major economic offense, identified *as an* illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property; to avoid payment or loss of money or property, or to obtain business or professional advantage. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:

(a) the offense involved multiple victims or multiple incidents per victim;

(b) the offense involved an attempted or actual monetary loss substantially greater than the usual offense or substantially greater than the minimum loss specified in the statutes;

(c) the offense involved a. high degree of sophistication planning. or occurred over a lengthy period of time;

(d) the defendant used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence, or fiduciary relationships; or

(e) the defendant has been involved in other conduct similar to the current offense as evidenced by the findings of civil or administrative law proceedings or the imposition of 'professional sanctions.

(5) The offense was a major controlled substance offense, identified as an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense. The presence of two or more of the circumstances listed below are aggravating factors with respect to the offense:

(a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so; or

(b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or

(c) the offense involved the manufacture of controlled substances for use by other parties; or

(d) the offender knowingly possessed a firearm during the commission of the offense; or

(e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy; or

(f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area

of disbursement; or

(g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional).

(6) The offender committed, .for hire, a crime against the person.

(7) Offender is a "patterned sex offender" (See Minn.Stat. § 609.108).

(8) Offender is a "dangerous ₒffender who commits a third violent crime" (See Minn.Stat. § 609.1095, subd. 2).

(9) Offender is a "career offender" (See Minn. Stat. § 609.1095, subd. 4).

(10) The offender committed the-crime as part of a group of three or more persons who all actively participated in the crime.

(11) The offender intentionally selects the victim or the property against which the offense is committed, in whole or in part, because of the victim's, the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, age or national origin.

(12) The offender's use of another's identity without authorization to commit a crime. This aggravating factor may not be used when the use of another's identity is. an element of the offense.

* * *

F. **Concurrent/Consecutive Sentences:**

Generally, when an offender is ccnvicted of

multiple current offenses, or when there is a prior felony sentence which has not expired or been discharged, concurrent sentencing is presumptive. In certain situations consecutive sentences are presumptive; there are other situations in which consecutive sentences are permissive. These situations are outlined below. The use of consecutive sentences in any other case constitutes a departure from the guidelines and requires written reasons pursuant to Minn.Stat. § 244.10, subd. 2 and section D of these guidelines.

When consecutive sentences are imposed, offenses are sentenced *in* the order in which they occurred.

For persons who, while on probation, parole, or incarcerated, pursuant to an offense committed on or before April 30, 1980, commit a new offense for which a consecutive sentence *is* imposed, *service* of the consecutive sentence for the current conviction shall commence upon the completion of any incarceration arising from the prior sentence.

* * *

Permissive Consecutive Sentences -

Except when consecutive sentences are presumptive, consecutive sentences are permissive (may be given without departure) only in the following cases:

1. A current felony conviction for a crime against a person may be sentenced consecutively to a prior felony sentence for a crime against a person which has not expired or been *discharged;* or

2. Multiple current felony convictions for crimes against persons may be sentenced. consecutively to each other; or

3. A current felony conviction for escape from lawful custody, as defined in Minn.Stat. §609.485, when the offender did not escape from the executed prison sentence; may be sentenced consecutively to the sentence for the offense for which the offender was confined; or

4. A current felony conviction for a crime commited while on felony escape from lawful custody, as defined in Minn.Stat. § 609.485, from a nonexecuted felony sentence may be sentenced consecutively to the sentence for the escape or for the offense for which the offender was confined; or

5. A current felony conviction for a crime committed while on felony escape from lawful custody, as defined in Minn.Stat. § 609.485, from an executed felony sentence may be sentenced consecutively to the sentence for the escape; or

6. A current felony conviction for Fleeing a Peace Officer in a Motor Vehicle as defined in Minn.Stat. § 609.487 or Criminal Sexual Conduct in the First through Fourth Degrees with force or violence *as* defined in Minn. Stat. § 609.342

through 609.345.

A current conviction for a felony assault committed while in a local jail or workhouse may be sentenced consecutively to any other executed prison sentence if the presumptive disposition for the other offense *was* commitment to the Commissioner of Corrections.

Consecutive sentences are permissive under the above criteria numbers 1-4 only when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections as determined under the procedures outlined in Section II.C. In addition, consecutive sentences are permissive under number above, involving a current felony conviction for a crime against a person and a prior felony sentence for a crime against a person which has not expired or been discharged, only when the presumptive disposition for the prior offense(s) was commitment to the Commissioner of Corrections as determined under the procedures outlined in section II.C. If the judge pronounces a consecutive stayed sentence in these circumstances, the stayed sentence is a mitigated dispositional departure, but the consecutive nature of the sentence is not a departure if the offense meets one of the above criteria. The consecutive stayed sentence begins when the offender completes the term of imprisonment and is placed on supervised release.

Consecutive sentences are always permissive under the above criteria numbers 5 and 6.

For each offense sentenced consecutive to another offense(s), other than those that are presumptive, a zero criminal history - score, or the mandatory minimum for the offense, whichever is greater, shall be

used in determining the presumptive duration. The purpose of this procedure is to count an individual's criminal history score only one time in the computation of consecutive sentence durations. For persons sentenced under Minn.Stat. § 609.229, subd. 3, where there is a sentence for an offense committed for the benefit of a gang, the presumptive duration for the underlying the highest severity level if sentence consecutively, would include additional months as outlined in Section II.G and using the respective criminal history score appropriate for consecutive sentencing. The presumptive duration for each offense concurrently shall be based on the Offender's criminal history as calculated by following the procedures outlined in II.B.

M.S.A. § 243. 167

Minnesota Statutes Annotated Currentness

Subdivision 1. Definition. As used in this section, "crime against the person" means a violation of any of the following or a similar law of another state or of the United States: section 609.165; 609.185; 609.19; 609.195; 609.20; 609.205; 609.221; 609.222; 609.223; 609.2231; 609.224, subdivision 2 or 4; 609.2242, subdivision 2 or 4; 609.2247; 609.235; 609.245, subdivision 1; 609.25; 609.255; 609.3451, subdivision 2; 609.498, subdivision 1; 609.582, subdivision 1; or 617.23, subdivision 2; or any felony-level violation of section 609.229; 609.377; 609.749; or 624.713.

253B.02. Definitions

Subdivision 1. Definitions. For purposes of this chapter, the terms defined in this section have the meanings given them.

* * *

Subd. 4a. Crime against the person. "Crime against the person" means a violation of or attempt to violate any of the following provisions: sections 609.185 (murder in the first degree); 609.19 (murder in the second degree); 609.195 (murder in the third degree); 609.20 (manslaughter in the first degree); 609.205 (manslaughter in the second degree); 609.21 (criminal vehicular homicide and injury); 609.215 (suicide); 609.221 (assault in the first degree); 609.222 (assault in the second degree); 609.223 (assault in the third degree); 609.224 (assault in the fifth degree); 609.2242 (domestic assault); 609.23 (mistreatment of persons confined); 609.231 (mistreatment of residents or patients); 609.2325 (criminal abuse); 609.233 (criminal neglect); 609.2335 (financial exploitation of a vulnerable adult); 609.235 (use of drugs to injure or facilitate crime); 609.24 (simple robbery); 609.245 (aggravated robbery); 609.25 (kidnapping); 609.255 (false imprisonment); 609.265 (abduction); 609.27, subdivision 1, clause (1) or (2) (coercion); 609.28 (interfering with religious observance) if violence or threats of violence were used; 609.322, subdivision 1, clause (2) (solicitation); 609.342 (criminal sexual conduct in the first degree); 609.343 (criminal sexual conduct in the second degree); 609.344 (criminal sexual conduct in the third degree); 609.345 (criminal sexual conduct in the fourth degree); 609.365 (incest); 609.498, subdivision 1 (tampering with a witness); 609.50, clause (1)

(obstructing legal process, arrest, and firefighting); 609.561 (arson in the first degree);. 609.562 (arson in the second degree); 609.595 (damage to property); and 609.72, subdivision 3 (disorderly conduct by a caregiver).

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

District Court File No. K4-03-1313

State of Minnesota
Plaintiff,

v.

Mark Krueger,
Defendant.

MEMORANDUM REGARDING JURY VERDICT QUESTIONS

As the above matter now stands, there is one aggravating factor under consideration.

That factor relates to the issue of multiple forms of penetration, and if there are multiple forms of penetration, whether or not those acts were done in such a way as to constitute a substantial and compelling factor that is different from the usual conduct done by persons engaged in similar actions.

I.

ANY FACTOR USED AS A BASIS TO SENTENCE BEYOND THE PRESUMPTIVE SENTENCE MUST BE FOUND BY A JURY.

This body of law is now well established. Blackly v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004); Cunningham v. California, 549 U.S. _ (2007).

Any and all factors relied upon by a sentencing Court must now be found by a jury, unless knowingly admitted by the Defendant, or where the jury is knowingly waived by the Defendant.

In Cunningham, at Page 8, the Supreme Court

stated:

> "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a Defendant to a greater potential sentence must be found by a jury, not a Judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

In Cunningham, at Page 17, the Court further stated:

> We cautioned in Blakley, however that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the Judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. Blakley, 542 U.S., at 305, and on n.8.

At Page 18, the Cunningham Court went on to state:

> The Black Court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however leave no room for such an examination.

> Asking whether a defendant's basic jury trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry Apprendi's "bright-line rule" was designed to exclude. See Blakley, 542 U.S., at 307-308.

IN ORDER TO BE A BASIS FOR AN UPWARD DEPARTURE IN MINNESOTA, THERE MUST BE SUBSTANTIAL AND COMPELLING CIRCUMSTANCES.

It is well established in Minnesota that before a Court may sentence beyond the presumptive sentence, there must be substantial and compelling reasons. State v. Hutton, 2003 WL 22889448; State v. Best, 449 N.W.2d 426, 427, (Minn. 1989; State v. cook, 351 N.W.2d 355 (Minn.App. 1984).

It is not enough that something be called an "aggravating factor". Under Minnesota law, it must be a substantial and compelling factor that is beyond the conduct typically found in similar types of cases.

Now under Blackly, and Cunningham, it is clear that a jury, not a judge, must decide whether or not a particular act is an aggravating factor, which would constitute substantially and compellingly more severe circumstances than the acts normally done in cases of a similar type.

Whether or not a factor is a substantial and compelling circumstance, is as much, if not more, of a jury question than the fact itself.

For example, a victim in a rape case may suffer a cut on the finger which theoretically could constitute an aggravating factor of suffering injury during the commission of the crime, however the cut

on the finger could not seriously be considered a substantial and compelling circumstance for an upward departure.

Increase the situation to a severe cut on the arm, to a broken arm, and on and on. At what point the injury becomes a substantial and compelling circumstance that would warrant an increased sentence is clearly now a jury question.

Further, one could argue that any act of forcible rape involves a certain amount of violence and cruelty. Whether the violence and cruelty in a particular case constitutes substantial and compelling circumstances that are beyond the usual force and violence in similar types of cases must now to be determined by the jury.

Based of the foregoing, Defendant respectfully demands that questions substantially in the form set forth in Defendant's Requested Verdict Form be submitted to the jury in this matter.

Respectfully Submitted,

s/_____

R. Gordon Nesvig
Attorney for Defendant
Box 255
Cottage Grove, MN 55016-0255
(651) 459-7000

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

District Court File No. K4-03-1313

State of Minnesota
Plaintiff,

v.

Mark Krueger,
Defendant.

DEFENDANTS REQUESTED VERDICT FORM

Question Number 1. Do you unanimously find beyond a reasonable doubt that the Defendant engaged in multiple forms of penetration in this case.

_____Yes _____ No

If your answer to Question Number 1 was no, please date and sign this Verdict Form. You do not have to answer Question Number 2.

Question Number 2. If your answer to Question Number 1 was yes, do you unanimously find beyond a reasonable doubt that these multiple forms of penetration were done in such a way as to constitute substantial and compelling, factors that were more severe than the usual conduct done by persons engaged in similar actions.

_____Yes _____ No

Please date and sign this Verdict Form.

Dated: _____

_____
Jury Foreperson

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) SS:
COUNTY OF WASHINGTON)

R. Gordon Nesvig, being duly sworn, on oath says that on the 1st day of February, 2007, _he served the attached Defendants Requested Verdict Form and Memorandum Regarding Jury Verdict Questions upon Jill Gerber, Asst. Ramsey County Attorney therein named, personally, at 50 West Kellogg Blvd. #315, St. Paul, in the Countr of Ramsey, State of Minnesota, by handing to and leaving with Jackie Langliss a true and correct copy thereof.

s/_____
R. Gordon Nesvig

Subscribed and sworn to before me this 1st day of February, 2007.

s/_____
Lori F. Edwards
Notary Public-Minnesota

State of Minnesota
County of Ramsey

District Court
Second Judical District

The State of Minnesota,
Plaintiff,

Special Verdict

v.

Court File No. K4031313

Mark Richard Krueger,
Defendant.

You must decide if the state has proven the following aggravavting factor beyond a reasonable doubt. If you find that the aggravating factor has been proven beyond a reasonable doubt, check "yes". If you find that the aggravating factor has not been proven beyond a reasonable doubt, check "no".

Did J.R.S. suffer multiple (more than one) forms of penetration and sexual contact by the defendant?
Yes *No*

_____
Presiding Juror

Dated this _____ day of _____, 2007 at St. Paul, Minnesota.

To be completed by clerk:
Filed in open Court on _____ at _____ M.

Court Clerk _____

STATE OF MINNESOTA
IN COURT OF APPEALS

A07-1993

State of Minnesota

Plaintiff,

vs.

District Court File No. K4-03-1313

Mark Krueger,

Defendant.

Date Judgment, Sentence or Order Entered: May 26, 2006
Resentence: July 19, 2007

APPELLANT'S REPLY BRIEF

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FACTS

Respondent incorrectly states in its version of the facts that the jury "found the aggravating factor of multiple forms of penetration".

The jury actually found that J.R.S. suffered more than one form of penetration and sexual contact by the defendant. Appellant's Appendix A - 88.

A. Multiple forms of penetration

Respondent challenges Appellant's position that multiple forms of penetration can not be used as an aggravating factor for a durational departure for violation of Minn. Stat. 609.342 Subd. 1 (g).

First, Respondent cites a number of cases which have no bearing on this issue:

State v. Van Gorden, 326 N.W.2d 633 (Minn. 1982). In this case the defendant broke into a 66 year old stranger's home, dragged her outside, beat her, and raped her, causing permanent injury. Although this case did involve multiple forms of penetration, it was not a case involving 609.342 Subd. 1 (g).

State v. Butterfield, 555 N.W.2d 526 (Minn. App. 1996). Here, the defendant kidnapped a stranger at knife point and forced her to have sex with him with extreme cruelty. This was not a case involving 609.342 Subd. 1 (g).

State v. Griffith, 480 N.W.2d 347 (Minn.App. 1992). This case involved 3rd degree criminal sexual conduct in violation of 609.344, and 4th degree criminal sexual conduct in violation of 609.345. This case also involved multiple forms of penetration, but it was not a case involving 609.342 Subd. 1 (g).

The cases cited by Respondent that do involve 609.342 Subd. 1 (g) are distinguishable:

Rairdon v. State, 557 N.W.2d 318 (Minn. 1996). This was a severe case where the defendant began sexually abusing his daughter when she was 6 or 8 years old. This continued until she was 13, at which time she told defendant that she did not want to have sex with him any more. Two months later, defendant killed her and hid her body. Although this case was decided in 1996, the murder occurred in 1985. Defendant sought post conviction relief 9 years after his sentence.

In Rairdon, the defendant plead guilty to first degree criminal sexual conduct, which apparently had a presumptive sentence of 45 months, and second degree criminal sexual conduct, which apparently had a presumptive sentence of 25 months. After trial the defendant was convicted of 1st and 2nd degree murder. The District Court imposed upward departure sentences of 90 and 50 months, as well as the upward departure of making these sentences consecutive to defendant's 1st and 2nd degree murder sentence.

The District Court cited young age and vulnerability, nature and context of the conduct (60 or more instances), and the 5 year duration of the misconduct, which ended only when sarah was murdered, as factors for the upward departure. The case does not say what the multiple forms of penetration were based on.

The Supreme Court allowed the sentence to stand, undoubtedly in large part because of the murder. The Court also stated that the fact that the defendant waited 9 years to seek post conviction relief was a factor that weighed against the defendant.

State v. Dietz, 344 N.W.2d 386 (Minn. 1984) was an unusual case, involving a 9 year old girl. The

Supreme Court listed numerous factors which could not be considered as a basis for durational departure, but then allowed the departure to stand. The Court cited State v. Cox, 343 N.W.2d 641 (Minn. 1984) as authority for multiple forms of penetration, however Cox did not involve intrafamilial sexual abuse under 609.342 Subd. 1 (g).

The defendant in Cox pretended to be interested is a house. When the real estate agent took the defendant into the basement of a house, he raped her, causing severe injury, and took her clothes.

The Court in Dietz also cited State v. Van Gorden, cited above, however, as stated above, Van Gorden did not involve intrafamilial sexual abuse under 608.342 Subd. 1 (g).

In Dietz the defendant pleaded guilty only to counts involving vaginal penetration, but apparently made admissions of other types when talking to the police. These admissions could no longer be used as a basis for upward departure following Taylor v. State, 670 N.W.2d 670 (Minn. 2003).

In State v. Sebasky, 547 N.W.2d 93 (Minn.App 1996), The Court of Appeals allowed an upward durational departure, primarily because the defendant was HIV positive. In Sebasky, the defendant hired several different young boys to do work for him, and then induced the boys' mothers to allow them to stay overnight at his home, where he abused them.

In Sebasky, the Court relied on State v. Perkins, 540 N.W.2d 908 (Minn.App. 1995), where the defendant, who knew he was HIV positive, met the victim in a bar and gave her a ride to his hotel, where he raped and beat her, and threatened to kill her and her children if she told anyone. The trial

court was most offended by the fact that the defendant knew that he had AIDS when he committed the sexual assault. Perkins did not involve intrafamilial sexual abuse under 608.342 Subd. 1 (g).

In contrast, see State v. Peterson, 329 N.W.2d 58, 60 (Minn. 1983), also a Supreme Court case, where the Court did not allow a departure of consecutive sentence where multiple forms of sexual intercourse and contact were involved.

The Court stated in FN1:

> However in the context of multiple acts of intrafamilial sexual abuse of a single family member at different times, the intent of the legislature is that the perpetrator be convicted and sentenced only once per victim.

Also see State v. Brusven, 327 N.W.2d 591, 593 (Minn. 1982), another Supreme Court case, where the Court stated:

> In this case the trial court relied in part on the fact that defendant committed multiple acts of sexual misconduct with the victim. However that fact was considered by the legislature in determining the elements of intrafamilial sexual abuse in the first degree and cannot be relied upon again as a basis for departure,

The Court modified the defendant's sentence to the presumptive sentence of 45 months.

In this case the Court referred to "multiple acts of sexual misconduct". It is submitted that this would have the same meaning as, or would include, multiple

forms.

And in State v. Wasson, (2000) WL 1530255, at Page 4, the Court of Appeals stated:

> Sexual penetration includes sexual intercourse, cunnilingus, fellatio, and intercourse, or any intrusion into the genital or anal openings of the victim's body by any part of the actor's body or any object used by the actor. Minn.Stat. 609.341, subd. 12 (1996). **Based on this definition, multiple acts and multiple forms of penetration are essential elements of the charged offense and, thus, cannot be used as a basis to depart.**

Emphasis added.

Neither Peterson, Brusven, or Wasson, have been overruled.

In addition, Comment II.F.06 of the Minnesota Sentencing Guidelines And Commentary, Revised August 1, 1991, states:

> The criterion that crimes must be against different persons for permissive consecutive sentencing is designed to exclude consecutive sentences in two types of situations. One type involves multiple offenses against a victim in a single behavioral incident such as burglary with a dangerous weapon and aggravated robbery with bodily harm. **The requirement of different victims is also intended to exclude consecutive sentences in domestic abuse and child abuse situations**

> **when there are multiple incidents perpetrated. against a victim over time. Assault, criminal sexual conduct, intrafamilial sexual abuse, and incest are the conviction offenses most frequently found in domestic abuse and child abuse cases. Multiple incidents against a victim typifies these types of situations. In fact, the intrafamilial sexual abuse provisions delineate multiple incidents as an element of the offense. The high severity rankings assigned to offenses that tend to involve very young victims reflect the understanding that multiple incidents generally occur in these kinds of situations.** The Commission believes that a uniform policy reflected in high severity rankings provides the best approach in sentencing these cases. Permissive consecutive sentences would result in enormous disparity based on varying charging practices of prosecutors and discretionary judicial decisions.

(Emphasis added.)

On one hand, the courts state that a defendant's conduct must be significantly more serious than that typically involved in the commission of the crime in question before there can be an upward departure, yet every sexual abuse case cited in both Appellant's and Respondent's briefs involves multiple forms of penetration. How can anyone still argue that multiple forms of penetration

is an unusual aggravating factor not typically found in other similar cases, when it is recited in every case.

This is likely why the above commentary states that "the high severity rankings assigned to offenses that tend to involve very young victims reflect the understanding that multiple incidents generally occur in these kinds of situations", and why the Court in Peterson, Brusven, and Wasson would not allow upward departure based on multiple forms of penetration.

B. Conduct significantly more serious than that typically involved in the commission of the crime in question

Respondent argues that whether or not a defendant's conduct is more serious than that typically involved in the commission of the crime in question is a question of law. The undersigned has not seen any case where it has been stated that way, nor has respondent cited any.

However, if that were true, every appellate court would have to review those decisions de novo, because it is well established that appellate courts review questions of law de novo.

But in reality, calling the decision of whether or not a defendant's conduct is more serious than that typically involved in the commission of the crime in question a question of law, is not going to satisfy the mandates of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) and Cunningham v. California, 549 U.S.___ (2007).

Before Blakely and Cunningham, the line was blurry, because the courts decided what was an

aggravating factor, whether it existed, and whether it made a defendant's conduct substantially more serious than that typically found in other cases.

Except for the few suggested in the sentencing guidelines, "Aggravating factors" seem to come out of nowhere. Any judge was able to refer to some act done during the commission of a crime, and call it an aggravating factor, determine that it existed, and then, often without even articulating it, determine that such factor made the defendant's conduct is more serious than that typically involved in the commission of the crime in question, and then impose an upward departure in the sentence.

In Cunningham, at Page 8, the Supreme Court stated:

> "This Court has repeatedly held that, under the Sixth Amendment, **any** fact that exposes a Defendant to a greater potential sentence must **be found by a jury, not a Judge,** and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

Emphasis added.

In Cunningham, at Page 17, the Court further stated:

> We cautioned in Blakely, however that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if,

> instead, the Judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. Blakely, 542 U.S., at 305, and on n.8. Emphasis added.

At Page 18, the Cunningham Court went on to state:

> The Black Court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however leave no room for such an examination. **Asking whether a defendant's basic** jury trial right is preserved, though some facts essential to punishment are reserved for determination by the **judge, we have said, is the very** inquiry Apprendi's "bright-line **rule" was designed** to exclude. See Blakely, 542 U.S., at 307-308. Emphasis added.

The question is whether or not the acts of a Defendant rise to the level of being substantial and compelling enough to warrant a durational departure.

It is well established in Minnesota, that before a Court may sentence beyond the presumptive sentence, there must be substantial and compelling reasons. State v. Hutton, 2003 WL 22889448; State v. Best, 449 N.W.2d 426, 427, (Minn. 1989; State v. cook, 351 N.W.2d 355 (Minn.App. 1984).

It is not enough that something be called an

"aggravating factor". Under Minnesota law, it must be a substantial and compelling factor or circumstance that is beyond the conduct typically found in similar types of cases.

Respondent concedes that under Minnesota law, there can not be an upward departure from the presumptive sentence unless a defendant's conduct is significantly or substantially more serious than that typically involved in the commission of the crime involved. Respondent's Brief Page 5.

Whether or not a factor is a substantial and compelling circumstance that is beyond the conduct typically found in similar types of cases, is as much, if not more, of a jury question than the factor itself.

Under Blakely and Cunningham, only a jury can make that determination.

As the undersigned has pointed out, when comparing Appellant's conduct in this case to the conduct in all of the cases cited herein, Appellant's conduct is much **LESS** serious than that typically found in the commission of the crimes involved in other cases.

In this case the jury found that there was more than one form of penetration. The jury was not asked, nor did it find that there were more than two, nor did the jury find what the forms were.

In closing argument, the prosecutor rattled off five forms, and in his brief, Respondent claims that the videotape (Exhibit 2) shows multiple forms of penetration.

Appellant concedes that Exhibit 2 shows defendant engaged in oral and digital penetration with the girl. Exhibit 2 also shows what may be the girl gratuitously performing oral sex on the defendant, but it is not clear, because in that scene,

all we see is the back of the girl's hair.

The video clearly does not show vaginal or anal penetration. There was hearsay testimony received over objection, that at some time, defendant may have put his penis one half inch into the girl's vagina. Appellant understands that one half inch meets the statutory definition, however it is still far less than full penile penetration, which is almost always found in other cases of this type. There was no testimony as to anal. Both Appellant and the girl have always denied vaginal and anal penetration. Plea Transcript Page 9; Reply Appendix 1. Also see Page 8 from witness Kristine Clarke's report. Reply Appendix 2.

In any event, the amount, type, and degree of penetration in this case is obviously far less than what is typically found in other cases of this type.

This Court could make that determination, and modify Appellant's sentence to the presumptive sentence of 144 months without violating Blakely and Cunningham, however if that is not done, the question of whether or not defendant's conduct is significantly or substantially more serious than that typically involved in the commission of the crime involved, must be found by a jury before there can be an upward departure from the presumptive sentence.

At the end of the Rairdon opinion, the Court recited: "in the final analyses, determining whether severe aggravating circumstances are present 'must be based on our collective collegial experience in reviewing a large number of criminal appeals from all the district courts' ", citing State v. Norton, 328 N.W.2d 142 (Minn. 1882).

This is clearly making a fact determination that is no longer allowed following Blakely and

Cunningham. Blakely and Cunningham would be rendered meaningless if that were allowed.

C. Appellant's consecutive sentence

It is well established that imposing a consecutive sentence constitutes an upward departure, and requires some aggravating factors to support such upward departure.

The statutory presumption is that sentences should be concurrent. Minn. Stat. 609.15 Subd. 1. State v. Rasinski, 527 N.W.2d 193 (Minn.App. 1995). State v. Jennings, 448 N.W.2d 374, 375 (Minn.App. 1989). Minnesota Sentencing Guidelines II.F.

The Court of Appeals remanded Appellant's first appeal, State v. Krueger, 2004 WL 1878998, (Minn.App. 2004), Appellate Case No. A04-122, for consideration under Blakely, because Blakely was decided after that appeal had been briefed.

Appellant was unaware of Blakely at the time that appeal was briefed, and did not raise Blakely as to the trial court's departure under either Count I or Count II.

It is Appellant's position that following Blakely, the aggravating factors that would allow the departure of a consecutive sentence for Count II, if any, would have to be found by a jury, the same as they would have to be for Count I. If not under Blakely, it certainly would be required under Cunningham, where, as pointed out above, the court stated:

> **any** fact that exposes a Defendant to a greater potential sentence must **be found by a jury, not a Judge;** and

> Asking whether a defendant's basic jury trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry Apprendi's "bright-line rule" was designed to exclude.

The fact that the Court of Appeals has not granted Appellant relief on this issue is not a bar, because this case has not become final, which is necessary in order to ask the Supreme Court to review, just as the Court of Appeals dismissed Appellant's appeal in case No. A06-1603 because the case was not final in the district court.

Following remand from the Court of Appeals in State v. Krueger, Appellate Case No. A05-363, Appellant demanded that the State advise Appellant what aggravating factors it intended to prove, and the State provided two, which could relate to Count II:

> 3. The victim was posed in graphic sexual positions and photographed by the defendant repeatedly.
>
> 4. The defendant secretly videotaped the victim while he sexually abused her.

A-34.

Upon receipt of the State's proposed factors, appellant filed a motion opposing the State's request. A-35.

The trial court denied the States request as to the above factors. A-43.

Following the trial court's order, there are no

aggravating factors pertaining to Count II in this case. It does not even get to a jury question, because there are **NO** aggravating factors at all as to Count II. Therefore the presumptive concurrent sentence must be imposed.

CONCLUSION

1. Based on Peterson, Brusven, and Wasson, and the Minnesota Sentencing Guidelines Commentary, all cited above, Appellant respectfully requests that this Court rule that multiple forms of penetration can not be used as an aggravating factor for an upward departure in this case.

1. Because Appellant's conduct in this case was much less serious than that typically involved in the commission of the crime in question, Appellant respectfully requests that his sentence be reduced to the presumptive sentence of 144 months; or alternatively, that this case be remanded for a jury determination of whether Appellant's conduct was more or less serious than that typically involved in the commission of the crime in question.

3. Because there are no aggravating factors in this case as to Count II, Appellant respectfully requests that his sentence for Count II be modified to run concurrently with Count I.

Respectfully submitted, k

s/_____
R. Gordon Nesvig
Attorney for Appellant

STATE OF MINNESOTA
IN SUPREME COURT

Mark Krueger,
Petitioner,

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

vs.

State of Minnesota,
Respondent.

APPELLATE COURT CASE NUMBER: A07-1993

DATE OF FILING OF COURT OF APPEALS DECISION: NOVEMBER 10, 2008

TO: The Supreme Court of the State of Minnesota:

The Petitioner, Mark Krueger, requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

1. Under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004); Cunningham v. California, 549 U.S. 270 (2007), any and all factors that expose a defendant to a greater potential sentence, and are relied upon by a sentencing Court in imposing a greater sentence, must now be found by a jury, unless knowingly admitted by the Defendant, or where the jury is knowingly waived by the Defendant.

In Cunningham, at Page 8, the Supreme Court stated:

> "This Court has repeatedly held that, under the Sixth Amendment, **any.** fact that exposes a Defendant to a greater potential sentence **must be found by a jury, not a Judge,** and established beyond a reasonable doubt, not merely by a preponderance of the

evidence." (Emphasis added)

In Petitioner's case, there was one aggravating factor, and Petitioner requested that the issue of whether his conduct was significantly more or less serious than that typically involved in the commission of the crime in question, which is required before the Court may impose an upward durational departure, be submitted to a jury. The District Court refused, and the Court of Appeals affirmed.

The District Court also denied Petitioner's Motion to impose the presumptive sentence because multiple forms of penetration can not be used as a basis for upward departure for violation of 609.342, Subd. 1 (g), which is intrafamilial sexual conduct.

In its opinion, it appears that the Court of Appeals misunderstood Petitioner's position. It has always been petitioner's position that while multiple forms of penetration may have been used as an aggravating factor in some cases under 609.342, Subd 1, this Supreme Court has not allowed it under Subd. 1 (g). State v. Peterson, 329 N.W.2d 58, 60 (Minn. 1983), State v. Brusven, 327 N.W. 591, 593 (Minn. 1982). A- 38, A-53, 54, A-89, 90, Appellant's Reply Brief Pages 6, 7, 8. A-145-147.

The District Court also refused to modify the imposition of a consecutive sentence for Count II after it was determined that there were no aggravating factors as to Count II. This was also affirmed by the Court of Appeals.. At oral argument in the Court of Appeals, the State admitted that an aggravating factor was needed on Count II before a consecutive sentence Could be imposed.

2. Request for review is based on Rule 117,

Subd. 2 (a), (c), and (d) because, as to Count I, the decision of the Court of Appeals in this case is contrary to the mandate of the United States Supreme Court, and decisions of this Supreme Court, and the rule is being violated repeatedly in other cases: As to Count II, the decision of the Court of Appeals in this case is contrary to law.

3. Petitioner was convicted upon his plea of guilty to Counts I, II, and III. After coming up with 7 "aggravating factors" on its own, the District Court sentenced Petitioner to a double upward departure on Count I, a consecutive sentence on count II, and a concurrent sentence on Count III.

Petitioner appealed, and the Court of Appeals remanded as to Count I pursuant to Blakely, and affirmed as to Counts II and III. A04-122, A-132.

The District Court again affirmed without a jury hearing, based on its belief that Petitioner had admitted the "aggravating factors", and Petitioner again appealed. The Court of Appeals again remanded. A05-363, A-128.

Following the second remand, Petitioner demanded that the County Attorney (not the Judge) state what aggravating factors it sought to prove. The County Attorney submitted 4 factors, none of which were used by the Court at the time of sentencing. Petitioner filed an objection to all 4, and after hearing, the District Court denied 3, one of which pertained to Count I, and two of which pertained to Count H. The Court allowed one as to Count I, which was whether or not there were multiple forms of penetration. Order dated March 13, 2006, A-44.

Petitioner then filed a Motion asking that his sentence for count II modified to run concurrent with Count I, because following the Court's Order dated

March 13, 2006, there were no aggravating factors upon which to base the upward departure of a consecutive sentence for Count II, and that Petitioner's sentence for Count I be modified to the presumptive sentence of 144 months, because multiple forms of penetration can not be used as an aggravating factor for violation of 609.342, Subd. 1 (g). Petitioner also demanded that if a jury was to be impaneled, the jury be asked whether such multiple forms of penetration done by Petitioner constitute substantial and compelling circumstances which are significantly more than usual for the offense in question. A-51. The Court denied Petitioner's Motion, A-112, 113, and Petitioner again appealed. On motion of the State, the Court of Appeals dismissed the appeal, stating that because a sentencing jury had not been impaneled and a final sentencing decision had not been reached, the appeal was premature. State v. Krueger, Appellate Court File No. A06-1603, A-126.

Petitioner submitted a Memorandum Regarding Jury Instructions, pointing out that under Minnesota law, before there can be an upward departure, there must be substantial and compelling factors that go beyond the conduct typically found in similar types of cases, and that, based on Blakely v. Washington, 542 U. S. 296, 124 S. Ct. 2531 (2004) and Cunningham v. California, 549 U.S. 270 (2007), whether or not there was conduct substantially and compellingly more severe than the acts normally done in similar cases is a fact that must be found by a jury. A64. Petitioner also submitted a requested verdict form. A-68.

The District Court refused to submit that issue to the jury, and instead submitted the sole question of

whether or not there was more than one form of penetration. A-85. The jury answered yes, and the Court, without finding that Petitioner's conduct was more severe than the acts normally done in similar cases, again imposed the upward double departure. A-97, 98.

Petitioner appealed, and the Court of Appeals affirmed. At Page 5, the Court of Appeals acknowledged that there must be conduct "significantly more serious than typically involved in the commission of the offense" before there can be an upward departure, but made absolutely no attempt to justify why that question should not be submitted to a jury as required by Blakely and Cunningham.

At Page 7, the Court of Appeals stated that Petitioner provided no legal support for his position, apparently ignoring Blakely and Cunningham. The Court of Appeals cited State v. Rodriguez, 754 N.W.2d 672 (Minn. 2008) and State v. Chauvin, 723 N.W.2d 20 (Minn. 2006) as authority that a jury does not have to decide if a defendant's conduct was significantly more serious than that typically done in the commission of similar offenses, however neither Rodriguez or Chauvin dealt with that issue at all.

The record will show that in this case, petitioner's conduct was significantly LESS serious than that typically involved in the commission of similar offenses.

4. The refusal of the District Court to have a jury decide the question of whether Petitioner's conduct was significantly more severe than that typically involved in similar cases, and the affirmation by the Court of Appeals, is in direct conflict with the mandates of the United States Supreme Court in Blakely and Cunningham.

This Supreme Court has ruled that multiple acts of intrafamilial sexual abuse, which would include multiple forms of penetration, cannot be used as a basis for an upward departure for convictions under 609.342, Subd. 1 (g).

As to consecutive sentence on Count II, it is respectfully submitted that the Court of Appeals has misapplied the sentencing guidelines. Sentencing Guidelines Section F provides that for multiple current felony convictions, consecutive sentences may only be used for those offenses listed in Section VI. 609.342, Subd. 1 (g) is not on that list. The Comment under II.F.04 seems to say that both offenses have to be on the Section VI list, and the Comment further states that consecutive sentencing is not permissive when the court has given an upward durational departure on any of the other current offenses.

The Court of Appeals said that the issue of concurrent sentence was final after A04-122, however because the case was remanded and a final sentencing determination had not been reached, Petitioner could not seek review until now. Hankerson v. State, 723 N.W.2d 232, 234 (Minn. 2006). In addition, the complete lack of aggravating factors as to Count II had not been determined. A-90, 91. Also, the District Court did not state any reasons for the consecutive sentence departure.

Respectfully Submitted,

s/_____

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(2)

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No. 08-1298

In the Supreme Court of the United States

Mark Krueger,

Petitioner,

v.

State of Minnesota,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner respectfully petitions the Court for rehearing, or reconsideration, of the Petition For Writ Of Certiorari, which was denied by the Court on June 15, 2009, for the following reasons:

STATE COURTS ARE NOT PROPERLY COMPLYING WITH THE MANDATES OF BLAKELY AND CUNNINGHAM

Petitioner may not have adequately set forth the manner in which Minnesota Courts, and other state Courts are failing to fully comply with the decisions of this Court in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) and Cunningham v. California, 549 U.S. 270 (2007), and are avoiding the mandates of these decisions.

THE BASIC RULE

In Minnesota, as well as many other states, the basic rule is that a Defendant's conduct must be substantially more serious than that typically involved in the commission of the offense in question before there can be an upward departure in sentencing. State v. Best, 449 N.W.2d 426, 427, (Minn. 1989); State v. cook, 351 N.W.2d 355 (Minn.App. 1984); State v Cowen, 87 Wash.App. 45, 55, 939 P.2d 1247, 1254.

It is not enough that something be called an "aggravating factor" and found by a jury to exist. Under Minnesota, and most state laws, a defendant's conduct must be a significantly more serious than that typically found in similar types of cases, which is as much a jury fact question as any "aggravating factor".

Even the Court of Appeals in this case acknowledged that:

> Generally in determining whether to depart durationally, the District Court must determine whether the Defendant's conduct was "significantly more serious than typically involved in the commission of the offense."

citing State v Best, id. Appendix Page A-5.

HOW THE COURTS ARE FAILING TO COMPLY

The courts are submitting simple, so called "aggravating factors" to juries for finding, but are refusing to allow juries to decide the basic question of whether or not a defendant's conduct was significantly more serious than that typically involved in the commission of the crime in question.

In Cunningham, at Page 8, the Supreme Court stated:

> This Court has repeatedly held that, under the Sixth Amendment, **any** fact that exposes a Defendant to a greater potential sentence **must be found by a jury, not a Judge**, and established beyond a reasonable doubt, not merely by a preponderance of the evidence. (Emphasis added)

It is respectfully submitted that this would include **any** material fact, not just an "aggravating factor, but **any** fact, and would certainly include the basic question of whether the Defendant's conduct was significantly more serious than that typically involved in the commission of the crime in question.

RULINGS BY THE MINNESOTA COURTS

The Minnesota Court of Appeals is still saying that the District Court must determine whether the Defendant's conduct was significantly more serious than that typically involved. Under the Sixth Amendment, as this Court set forth in Blakely and Cunningham, a Defendant is entitled to have a jury determine the fact question of whether or not his or her conduct was significantly more serious than that typically involved in the commission of the offense in question, particularly when that issue is timely raised by the defendant.

What the District Court did in this case was take a simple act that was very easy to prove and call it an "aggravating factor".

The act that the Court chose, was whether or not there was more than one form of penetration. The video clearly showed oral and digital penetration. The jury answered that question in the affirmative.

The District Court then imposed an upward departure of 12 years making a total sentence of 24 years for Count I.

The problem with this, is that the "more than one" form of penetration in this case, was not substantially more serious than that typically involved in the commission of the offense in question.

The District Court did not even make that finding, let alone, allow it to be made by a jury, even after repeated demands by Petitioner that this question be submitted to the jury. Appendix Pages A-30 to A-35.

The Court of Appeals held that "the District Court must determine". Appendix, A-5

At Appendix Page A-8, the Court of Appeals dismissed Petitioner's argument that a jury not a

District Judge must make the finding that a Defendant's conduct is significantly more serious than that typically involved in the commission of the crime in question, by citing two cases where the Minnesota Supreme Court affirmed upward departure when juries found aggravating factors without determining that the conduct underlying the offense was significantly more serious than that involved in the typical commission of a typical offense. The Court cited State v Rodriguez, 754 N.W.2d 672 (Minn. 2008), and State v Chauvin, 723 N.W.2d 20 (Minn. 2006), however these cases are not in point.

In Rodriguez, the case focused primarily on whether or not the Defendant had a right to confront witnesses against him, and whether the rules of evidence applied in a sentencing hearing.

In Rodriguez, the aggravating factor involved a major controlled substance offense and the criteria is specifically set forth in the list of aggravating factors as set forth in sentencing guidelines 2b(5). Appendix Page A-21.

Whether or not the conduct found as an aggravating factor was more serious than that typically involved in the commission of the offense in question was neither raised nor addressed in Rodriguez.

In Chauvin, the case centered around whether the District Court had authority to empanel a sentencing jury following Blakely, but before the legislature authorized it, and whether or not the aggravating factor of particularly vulnerable had to be in the complaint. The vulnerability factor is specifically listed in the sentencing guidelines in 2b(1). Appendix Page A-20.

Again, the issue of whether or not Defendants conduct was significantly more serious than that typically involved in the commission of similar crimes, was neither raised nor addressed in the case.

The decisions of the District Court, and the Court of Appeals in our case were wrong, and deprived Petitioner of his right to have that basic fact determined by a jury.

In a more recent case, State v. Adell, 755 N.W.2d 767, 774, (Minn.App. 2008), Judge Schellhas, which is the same Judge that wrote the opinion in our case, made the same incorrect ruling.

In Adell, the appellant also argued that multiple forms of penetration is not a valid aggravating factor because it is typical of the offense with which he was convicted.

The Court of Appeals acknowledged that:

> A court must justify a departure with "substantial and compelling circumstances" which are "those circumstances that make the facts of a particular case different from a typical case".

citing Taylor v. State, 670 N.W.2d 584, 587 (Minn. 2003).

The Court of Appeals then concludes:

> Thus, **we conclude** that multiple forms of penetration is not "typical" of the offense charged here and was properly considered by the district court to enhance appellant's sentence. (Emphasis added)

Here again, the Court, and not a jury, decided the fact of whether defendant's conduct was substantially more serious than that typically involved in the offense in question.

There are other unpublished Minnesota cases where the Courts have made the same ruling.

As Petitioner has previously pointed out, multiple forms of penetration is not listed as an aggravating factor in the sentencing guidelines. Appendix Pages A-19 to A-22.

Petitioner would further argue that digital penetration is involved in virtually every criminal sexual conduct case, and is therefore conduct that is typically involved in the commission of the offense in question. This would be especially true in cases involving 609.342 Subd. 1(g), which is where the actor had a significant relationship to the complainant. **That**, however, is the question that the jury must decide under our Constitution.

RULINGS BY THE COURTS IN THE STATE OF KANSAS

The case of State v. Bryant, 40 Kan.App.2d 308, 315, 191 P.3d 350, 356 (2008) involved a situation similar to this case.

In Bryant, which was a case involving securities fraud, the District Court took the simple fact of whether or not there was a fiduciary relationship between the defendant and the victim, called it an "aggravating factor", and submitted it to a jury.

When the jury found that there was a fiduciary relationship, the Court imposed a sentence which was an upward departure.

The Kansas Court of Appeals reversed, holding that a fiduciary relationship is typically present in securities fraud cases.

Unlike the Minnesota Courts, the Kansas Court of Appeals reached the correct result, but the point is, that the Court should have submitted the

question of whether or not defendant's conduct was substantially more serious than that typically involved in the offense in question to the sentencing jury in the first instance.

RULINGS BY THE COURTS IN THE STATE OF OREGON

Conversely, the Oregon Court of Appeals made the correct holding in the case of State v Howe, 198 Or.App. 568, 109, P.3d, 391, 392, (2005):

> The State argues that the claim of error asserted here is not apparent on the face of the record because (1) evidence at trial concerning the value of the property burned by defendant was uncontradicted, and (2) whether harm is greater than typical for an offense is a question of law for the court rather than a question of fact to be decided by jury.
>
> As to the state's first argument, it is beside the point whether evidence at trial **could have** supported a jury determination of a fact used to enhance a sentence; under the Sixth Amendment, a defendant is entitled to have the jury actually make such a determination. As to the second argument, we reject the state's suggestion that a determination that a crime caused harm "greater than typical" is not a factual finding. **Although an experienced judge might be especially competent to assess what is "greater than typical" harm from certain criminal conduct, such a determination is, nonetheless, a factual finding. Thus, to the extent that such a finding is used to enhance a sentence**

beyond what otherwise would be the statutory maximum, a defendant is entitled to a jury determination of that fact, based on evidence presented by the parties.

Finally, because the state has no valid interest in requiring defendant to serve an unconstitutional sentence, see Perez, 196 Or.App. at 373, 102 P.3d 705, we exercise our discretion under Ailes to reach the unpreserved error. Accordingly, we remand for resentencing. Sentence vacated; remanded for resentencing; otherwise affirmed". (Some emphasis added)

In the present case, the State also argued incorrectly in its brief that the question of whether or not Defendant's conduct was more serious than that involved in a typical case is a question of law, and the Court of Appeals appears to have adopted that position. Appendix Page A-5, A-8.

CONCLUSION

Except for State v Howe, id, the cases cited above are examples of the many cases being decided, where the Courts only submit selected fact questions to sentencing juries, but are refusing to allow a jury to decide the basic question of whether or not a Defendant's conduct was substantially more serious than that typically involved in the commission of the offence in question.

The heart of the issue may well be: is the question of whether or not a Defendant's conduct was substantially more serious than that typically involved in the commission of the crime or offence in question, a question of law, or a question of fact.

If it is a question of fact, defendants are entitled to have it decided by a jury. If it is a question of law, defendants may not be entitled to have it decided by a jury.

This is a very important question, and requires the direction of this court in order to bring the lower Courts into full compliance with this Court's decisions in Blakely and Cunningham.

Respectfully submitted,

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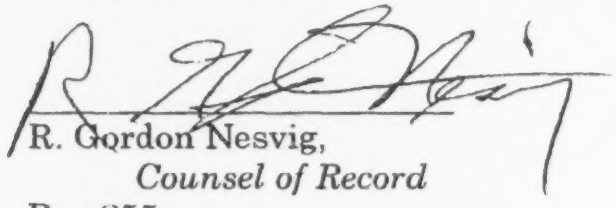
CERTIFICATE REGARDING PETITION FOR REHEARING

R. Gordon Nesvig, as counsel for Petitioner, hereby certifies that the Petition for Rehearing in this matter is limited to substantial grounds not previously presented, and is filed in good faith and is not for the purposes of delay.

Respectfully submitted,



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